89-704

Supreme Court, U.S.
FILED
OCT 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen F. Krozser,
Appellant,

v.

STATE OF CONNECTICUT,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

LOUIS MARSHALL WINER
2911 Dixwell Avenue
P.O. Box 5619
Hamden, CT 06518
(203) 281-3142

Counsel for Appellant

October 27, 1989

Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

Whether the State of Connecticut may condition access to its courts in actions for money damages brought under 42 U.S.C. Section 1983 by requiring not only that plaintiffs in such cases exhaust administrative remedies under Chapter 53 of the Connecticut General Statutes, *Claims against the State*, but also by requiring that they do so successfully by obtaining the permission of Connecticut's Claims Commissioner to sue the State?

PARTIES

The appellant in this Court is JACOB J. KROZSER, Administrator of the Estate of Stephen F. Krozser, who in such capacity was the plaintiff below. The only appellee in this Court is STATE OF CONNECTICUT, a defendant and appellee below. As to other defendants below: action against the CITY OF NEW HAVEN was withdrawn prior to the judgment of the Supreme Court of Connecticut; action against RAYMOND M. LOPES, in his Official Capacity as Commissioner of Correction of the State of Connecticut, abated upon his departure from office, and no substitution was made of his successor in office.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 3

HOW THE FEDERAL QUESTION WAS RAISED 7

STATEMENT OF THE CASE 10

THE QUESTION IS SUBSTANTIAL 15

CONCLUSION 16

APPENDIX 1A

TABLE OF AUTHORITIES

Cases: **Page(s)**

Akutowicz v. United States, 859 F.2d 1122, 1125–26 (2d Cir. 1988) 14

Barde v. Board of Trustees of Regional Community Colleges, 207 Conn. 59, 539 A.2d 1000 (1988) . . . 10–11

Burnett v. Grattan, 468 U.S. 42 (1984) 13

DeShaney v. Winnebago County Department of Social Services, 489 U.S. ____, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989) 10

Estelle v. Gamble, 429 U.S. 97 (1976) 10

Felder v. Casey, 487 U.S. ____, 101 L.Ed.2d 123, 108 S.Ct. 2302 (1988) 8, 13, 14

Fetterman v. University of Connecticut, 192 Conn. 539, 473 A.2d 1176 (1984) 12

Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) 12

Krozser v. City of New Haven, 212 Conn. 415, 562 A.2d 1080 (1989) 2, 8–9

Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982) 8, 14

Robertson v. Wegmann, 436 U.S. 584 (1978) 13

Sentner v. Board of Trustees of Regional Community Colleges, 184 Conn. 339, 439 A.2d 1033 (1981) 11

Textron, Inc. v. Wood, 167 Conn. 334, 355 A.2d 307 (1974) 12

TABLE OF AUTHORITIES (continued)

Constitutions: **Page(s)**

United States Constitution
Article VI, Clause 2 3
Eighth Amendment 3

Connecticut Constitution, 1965
Article Eleventh, Section 4 3

Connecticut General Statutes:

Chapter 13, Claims against the State
Section 4-142 3
Section 4-148 4
Section 4-160 4
Section 4-165 4

Section 304c, Alcohol and Drug Abuse
Section 17-155k 5
Section 17-155s 5

Chapter 926, Statute of Limitations
Section 52-577 5
Section 52-584 6

Chapter 925, Statutory Rights of Action and Defenses
Section 52-555 6

Chapter 927, Survival of Actions
Section 52-599 6

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen F. Krozser,
Appellant,

v.

- STATE OF CONNECTICUT,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

Jacob J. Krozser, Administrator of the Estate of Stephen F. Krozser, the appellant, appeals from the final judgment of the Supreme Court of Connecticut, dated August 1, 1989, holding that plaintiff must exhaust his administrative remedies prior to bringing an action under 42 U.S.C. Section 1983 in the Connecticut state courts.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Connecticut, which appears in the appendix hereto, p. 1A, *infra*, is reported at 212 Conn. 415, 562 A.2d 1080 (1989).

JURISDICTION

The judgment of the Supreme Court of Connecticut, affirming the dismissal of plaintiff's action for money damages under 42 U.S.C. Section 1983, upon motion to dismiss for sovereign immunity, for failing previously to successfully pursue and exhaust administrative remedies under Chapter 53 of the Connecticut General Statutes, was entered on August 1, 1989.

A supplementary Notice of Appeal to this Court, dated October 27, 1989, was timely filed in the Supreme Court of Connecticut on October 27, 1989. See p. 14A, *infra*.

This appeal is being docketed in this Court within 90 days from the entry of such judgment. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

CONSTITUTION OF THE UNITED STATES

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Eighth Amendment, United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

CONNECTICUT CONSTITUTION, 1965

Article Eleventh, Section 4

Sec. 4. Claims against the state shall be resolved in such manner as may be provided by law.

CHAPTER 53, CLAIMS AGAINST THE STATE

Sec. 4-142. Claims commissioner. Excepted claims. There shall be a claims commissioner who shall hear and determine all claims against the state except: . . .

* * *

Sec. 4-148. Limitation on presentation of claim. (a) No claim shall be presented under this chapter but within one year after it accrues. . . .

* * *

Sec. 4-160. Authorization of actions against the state. (a) When the claims commissioner deems it just and equitable, he may authorize suit against the state on any claim which, in his opinion, presents an issue of law or fact under which the state, were it a private person, could be liable. In each such action the claimant shall allege such authorization and the date on which it was granted. The state waives its immunity from liability and from suit in each such action and waives all defenses which might arise from the eleemosynary or governmental nature of the activity complained of. The rights and liability of the state in each such action shall be coextensive with and shall equal the rights and liability of private persons in like circumstances.

* * *

(d) Issues arising in such actions shall be tried to the court without a jury.

* * *

Sec. 4-165. Immunity of state officers and employees from personal liability. No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his duties or within the scope of his employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter. . . .

* * *

Sec. 4-165b. Claims against the state by inmates of state correctional and reformatory institutions. (a) On and after May 3, 1976, any inmate of any institution of the department of correction or the department of children and youth services who suffers an injury which results in a fatality or in a permanent handicap may file a claim against the state. Such claim shall be heard and decided in accordance with the provisions of this chapter.

CHAPTER 304c

ALCOHOL AND DRUG ABUSE

Sec. 17-155k. State policy re alcoholics and intoxicated persons. It is the policy of this state that alcoholics and intoxicated persons should not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society.

Sec. 17-155s. Regulations re treatment programs. Standards. Cooperation with commissioner of correction. Transfer of persons accused or convicted of nonviolent crimes.

* * *

(b) The commissioner of correction and the executive director of the commission on alcohol and drug abuse shall cooperate in establishing treatment and rehabilitation programs for alcoholics and drug-dependent persons confined in correctional institutions. Persons convicted of nonviolent crimes or confined in lieu of bond on nonviolent charges may be transferred . . . for treatment and rehabilitation upon agreement. . . .

CHAPTER 926

STATUTE OF LIMITATIONS

Sec. 52-577. Action founded upon a tort. No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of.

* * *

Sec. 52-584. Limitation of action for injury to person or property. No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, . . .

CHAPTER 925

STATUTORY RIGHTS OF ACTION AND DEFENSES

Sec. 52-555. Actions for injuries resulting in death. In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of.

CHAPTER 927

SURVIVAL OF ACTIONS

Sec. 52-599. Survival of actions and causes of actions. (a) A cause or right of action shall not be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of the deceased person.

HOW THE FEDERAL QUESTION WAS RAISED

At this trial level, this case was disposed of on the complaint and a motion to dismiss. (15A–18A, 19A–20A) The federal question was raised first by the following allegations of the complaint. The underlying Eighth Amendment claim is described in paragraphs 4 to 8, below; the federal question here pertinent, whether plaintiff was not required to pursue administrative remedies, was first raised by paragraph 9 of the complaint, below:

* * *

> 4. Plaintiff's decedent, STEPHEN F. KROZSER, was an alcoholic at all times pertinent herein. On or about June 8, 1985, he was taken into custody and was at that time suffering from *delirium tremens*. As a consequence of such conditions, he then and thereafter until his death had serious medical needs. . . .
>
> 5. Under Chapter 304c of the General Statutes of the State of Connecticut, it is the policy of the State that alcoholics should not be subject to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society. It is further the duty of defendant Commissioner [of Correction] Lopes and the executive director of the Connectiocut Alcohol and Drug Abuse Commission to establish treatment and rehabilitation programs for alcoholics confined in correctional institutions.
>
> 6. In connection with the actions and omissions of defendants and their agents hereinafter alleged, said defendants and their agents were acting under color of state law. The actions and omissions of defendants hereinafter alleged constituted deliberate indifference to the serious medical needs of said STEPHEN F. KROZSER. . . .

7. During the period of the above alleged custody, said STEPHEN F. KROZSER was moved from place to place, was not duly placed under supervision, medication, observation, and monitoring, as called for by his medical condition and needs, and was introduced into the processes of the criminal justice system, with the proximate result that on the morning of June 12, 1985, he died unobserved and unmonitored under his bed on the floor at the New Haven Community Correctional Center. . . .

8. Plaintiff brings this action under the provisions of Sections 1983 and 1988 of Title 42 of the United States Code. . . .

9. Under Chapter 53 of the General Statutes of the State of Connecticut, an administrative officer and procedure is and has been established to allow for the authorization of actions against the State and to provide for the waiver of the State's defense of sovereign immunity in accordance with the provisions therein. Under Section 1983 and 1988 of Title 42 of the United States Code, plaintiff need not exhaust such administrative remedies and is entitled to commence this action directly for this Court's determination in accordance with the provisions of said Chapter 53 that the State may be sued and its immunity waived.

These allegations anticipated the holding in *Felder v. Casey*, 487 U.S. ____, 101 L.Ed.2d 123, 108 S.Ct. 2302 (1988) that the rule against requiring exhaustion of administrative remedies in actions under 42 U.S.C. Section 1983 in federal courts earlier stated in *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), applies also to state court actions by virtue of the Supremacy Clause.

The Supreme Court of Connecticut characterized plaintiff's claims as follows: Plaintiff ". . . first contends that a complainant need not exhaust his 'administrative remedies'

prior to bringing a Section 1983 action in the state court. He next claims that the state trial court may 'borrow' applicable state law, pursuant to 42 U.S.C. Section 1988, to supplement federal law. In this regard, the plaintiff argues that the Superior Court may 'borrow' and apply General Statutes Section 4-160(a), which sets forth the standards to be used by the claims commissioner, to determine whether to authorize suit against the state. Finally, the plaintiff contends that chapter 53 of the General Statutes[9] 'discriminates' against the assertion of his decedent's federal rights under 42 U.S.C. Section 1983. We are unpersuaded." 212 Conn., at 419–420; pp. 5A–6A, below. (Footnote omitted.)

We emphasize here that we file this Statement not simply because of a mistake below under *Felder* and *Patsy* affecting this case only, but, as discussed below, because this is only one instance of a pervasive condition affecting all state court litigation for money damages under 42 U.S.C. Section 1983 in Connecticut.

It is also important to note that Sections 4-160(a), (d) and 4-165 of Chapter 53 of the Connecticut General Statutes establish the state as the designated defendant in respect of claims for damage or injury by a state officer or employee, immunize such officer and employee for "damage or injury, not wanton, reckless or malicious, caused in the discharge of his duties or within the scope of his employment," and require administrative authorization as a condition upon such suit, p. 4, *supra*.

STATEMENT OF THE CASE

The action below was dismissed on grounds of sovereign immunity on a motion to dismiss. The development of the factual and legal basis of the underlying Eighth Amendment claim for deliberate indifference to serious medical needs of an incarcerated person did not get beyond the allegations of the complaint.

Appellant's decedent, Stephen F. Krozser ("Krozser"), was an alcoholic suffering from *delirium tremens* when taken into state custody June 8, 1985. As a proximate result of deliberate indifference to his serious medical needs, Krozser died while still incarcerated on June 12, 1985. This occurred despite Connecticut's statutory policy to treat and cure alcoholics if non-violent, rather than punish them by incarceration, and despite the mandate that Connecticut's commissioner of corrections and the executive director of its commission on alcohol and drug abuse are to cooperate to establish treatment and rehabilitation programs for alcoholics confined in correctional institutions. Sections 17-155k, 17-155s(b), quoted at page 5, above. The statutory policy and duties, as well as the principles of *Estelle v. Gamble*, 429 U.S. 97 (1976), establish a Section 1983 claim here under the complaint's allegations that, because of the positive state duties, is not subject to the limitations effected by *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. ____, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989).

The issue here, however, is not the validity of the Eighth Amendment claim under Section 1983 but rather the questions: What conditions may the state place on prosecuting that claim for money damages in the state's courts, and whether the state can require not only exhaustion but the successful exhaustion of an administrative remedy?

Plainly, the Connecticut Supreme Court views such successful exhaustion as necessary. In *Barde v. Board of Trustees*

of Regional Community Colleges, 207 Conn. 59, 66, 539 A.2d 1000 (1988), that Court said:

> With respect to the monetary claim for a salary increase, the plaintiff admittedly failed to present his claim to the commissioner of claims. General Statutes Section 4-141, 4-142; . . . ." . . . The failure of the plaintiffs to pursue this administrative remedy precludes an adjudication of the constitutional claim they have raised . . . . No determination of whether a constitutional necessity exists that would supersede the state's sovereign immunity can be made when the alternative procedure available through the claims commissioner, which might have provided the relief sought, has been ignored . . . ." *Doe v. Heintz, supra*, [204 Conn. 17, 526 A.2d 1318 (1987)], 37. "[B]ecause exhaustion of such an alternative means of relief is a prerequisite to our jurisdiction to consider [the] constitutional claim;" *id.*, 34; we conclude that the trial court lacked jurisdiction and, therefore, properly granted the motion to dismiss.

It is important at this point to consider the principles applied by the Connecticut Supreme Court in extending the protection of sovereign immunity to individual state actors against whom suit is brought in their individual capacities under Section 1983. In that respect, the Connecticut Supreme Court has stated:

> ". . . We have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state . . . ." *Sentner v. Board of Trustees of Regional Community Colleges*, 184 Conn. 339, 342, 439 A.2d 1033 (1981).

Consequently, virtually any suit against a state employee, agent, or official, whether in the officer's individual or official

capacity, meets the defense of sovereign immunity, and, under the expansive definition of a suit against the state, as quoted, it is in practical effect always futile to seek money damages from a state employee, agent, or official, quite apart from the question of the financial responsibility of the official indemnified. See, for example, *Fetterman v. University of Connecticut*, 192 Conn. 539, 473 A.2d 1176 (1984) (state university's vice president, assistant vice president, and dean of agriculture, held immune from liability under Section 1983 for terminating tenured professor's salary and terminating accrual of retirement benefits without a hearing).

In some cases involving injunctive, or declaratory, or certain constitutional relief not precisely in the form of money damages, Connecticut permits a direct suit. See, *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977) (granting relief to remedy statewide disparities in tax financing of school districts); *Textron, Inc. v. Wood*, 167 Conn. 334, 355 A.2d 307 (1974) (awarding just compensation under taking clauses in respect of condemnation); such cases have no relevance here.

Therefore, it would be illusory for appellee to argue that this is a condition only upon suit against the state, the administrative procedure leading to which, if successful, puts the state in the position of the defendant, not an individual state actor whose financial responsibility may be doubtful but who would be the typical defendant in an action under Section 1983. Such an argument by appellee would be illusory because the cloak of sovereign immunity spread over the individual state actor is so broad under Connecticut Supreme Court decisions as to make it futile to seek a money remedy in state court against a state actor, individually.

As acknowledged in the opinion below (pp. 4A–5A), appellant did file a claim with the State Claims Commissioner seeking permission to sue the state within the limit of the one-year claim period. Section 4-148, Conn. Gen. Stat., quoted at p. 4, above. The action below was commenced, however, without the claims commissioner having acted on the claim,

when the two-year period prescribed by Connecticut's wrongful death statute (Section 52-555, Conn. Gen. Stat., quoted at p. 6, above) approached its end. It is clear under *Robertson v. Wegmann*, 436 U.S. 584 (1978), that that two-year period, applicable to all wrongful death actions in Connecticut and incorporated in the Connecticut wrongful death statute, would govern.

Thus, chapter 53 of the General Statutes does not form part of a framework of state law in which the state actor may be effectively sued in his or her individual capacity (subject to questions of individual financial responsibility which the Section 1983 litigant faces in any event) for damages for constitutional deprivations under Section 1983; rather, in the context of the Connecticut case law giving the broadest protection of "sovereign immunity" to individual defendants in such actions, the administrative procedure prescribed in chapter 53 is the *only* effective route to recovery of money damages in an action under Section 1983 in the state courts there. If Connecticut courts are to be used, the Section 1983 litigant is for all practical purposes forced to follow chapter 53's administrative procedure. All other doors to Connecticut courts are closed.

This, however, is directly contrary to the several principles enunciated in *Felder v. Casey*, 487 U.S. ____, 101 L.Ed.2d 123, 144, 108 S.Ct. 2302, 2312 (1988), reiterating the statements in *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984), that the central objectives of such actions, affording compensatory damages or injunctive relief, should not be permitted to be diluted or adulterated in the state forum, that such cases belong in court, and that the rights that such cases are intended to vindicate are judicially enforceable in the first instance.

Chapter 53 of the Connecticut General Statutes, Claims against the State, provides in Section 4-160(a) that, "When the claims commissioner deems it just and equitable, he may authorize suit against the state on any claim which, in his opinion, presents an issue of law or fact under which the state,

were it a private person, could be liable . . . ." p. 4, *supra*. To enforce those requirements as the opinions below would do would be squarely repugnant to the principles just stated from the foregoing authorities under the Supremacy Clause as interpreted in those authorities.

In determining whether such application of the state statutory requirement would discriminate against the federal rights in question, the Court below misapplies the parallel drawn in *Felder*, 101 L.Ed.2d, at 143, n.3, 108 S.Ct., at 2310, n.3. There, the parallel applied to determine whether the federal right was the subject of discrimination under a state statute or regulation was to measure the comparable private, analogous tort with a view to whether rights in respect of such tort were more easily or efficiently enforceable in the state court, not whether the federal, constitutional tort could be equally asserted in federal court.

Egregious custodial malpractice of the type actionable under the Eighth Amendment and Section 1983, if committed in respect of a prisoner's medical needs, is a tort with a private or common-law analogue. An alcoholic in the care and custody of a private sanatorium or a resident of a private institution who suffers from senile feeblemindedness would have a similar claim if serious medical needs were deliberately ignored. (For a governmental claim without a private analogue, see, for example, *Akutowicz v. United States*, 859 F.2d 1122, 1125–26 (2d Cir. 1988).) Either of such private hypothetical claimants, or a representative, would have immediate access to Connecticut courts with no exhaustion or other additional requirements; consequently, the federal right is the object of discrimination as applied in *Felder*. Beyond that, not only must the claim against the state be filed within the shorter, one-year period, the claimant must succeed in getting the claims commissioner's permission to sue and may not seek a jury trial.

Thus, as to the main principles of *Felder* and *Patsy*, the Court below is clearly not only in error but in error in a fashion that erects a serious obstacle to the pursuit of claims for money damages in the Connecticut state courts under 42 U.S.C. Section 1983 throughout the State.

THE QUESTION IS SUBSTANTIAL

We submit that a most significant consideration in the evaluation of the issue here advanced is that the vice of the situation below, in litigating such claims in Connecticut, is that the situation strongly works to perpetuate itself: the combination of the broad cloak of sovereign immunity extended to individual state actors under the case law evidenced by the quote at page 11, above, and the ruling of the Court in the opinion below, throttles precisely that litigation which would otherwise tend to correct the vice. With such strong battlements erected against money recoveries in state court litigation of these claims, most will attempt to vindicate the claim in federal court, thus stifling the accurate presentation to this Court of the real obstacles below and tending to make an appeal such as this appear to be no more than an isolated occurrence.

The issue of itself raises strong principles of federalism which, if not reviewed, will allow the continued distortion of their vindication in Connecticut, whether in state or federal court.

Beyond the question of crowded federal dockets, under *Felder*, and with good reason, the state courts should be as available and efficient as the federal courts for the litigation of such claims, and two aspects of such litigation would make the state courts preferable if their doors were genuinely open. In claims of this type involving state agents, employees, or officials, the presence of the Eleventh Amendment tends to make federal court litigation awkward and stilted. And with state statutes, regulations, institutions, and actors involved, the use of state courts in such litigation, if genuinely available, would provide a forum more familiar with those legal and factual aspects of the claims particularly related to state activities.

Finally, following the important basic precepts set out in *Felder*, it would be highly advantageous, both in Connecticut and throughout the United States, to show the further elucidation of those precepts by interstitial application in the particular circumstances here.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

LOUIS MARSHALL WINER
2911 Dixwell Avenue
P.O. Box 5619
Hamden, CT 06518
(203) 281-3142

Counsel for Appellant

October 27, 1989

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen F. Krozser,
Appellant,

v.

STATE OF CONNECTICUT,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
OPINION AND JUDGMENT BELOW	1A
NOTICE OF APPEAL	14A
COMPLAINT	15A
MOTION TO DISMISS	19A

a strong disincentive for state disclosure of exculpatory or impeachment evidence. Such a disincentive is inconsistent with the fair trial guarantee that underlies *Brady*, and inconsistent with the prosecutor's role as "the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Id., 675; *Berger* v. *United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

Accordingly, I respectfully dissent.

JACOB J. KROZSER, ADMINISTRATOR (ESTATE OF STEPHEN T. KROZSER) *v.* CITY OF NEW HAVEN ET AL. (13589)

SHEA, CALLAHAN, GLASS, COVELLO and HULL, Js.

The plaintiff administrator sought damages from the defendants, the city of New Haven, the state of Connecticut and the commissioner of correction, for the allegedly wrongful death of his decedent. The state and the commissioner of transportation moved to dismiss claiming that the suit was barred by the doctrine of sovereign immunity. The trial court granted the motion and rendered judgment in favor of the state and the commissioner, and the action against the city was withdrawn. The plaintiff appealed claiming, inter alia, that because the action was brought pursuant to the federal civil rights act (42 U.S.C. §§ 1983 and 1988) the trial court had the authority to waive sovereign immunity. *Held* that the trial court did not err in dismissing the action; by statute (§ 4-160 [a]), only the claims commissioner can waive sovereign immunity, § 1983 does not abrogate the common law doctrine of sovereign immunity, § 1988 does not authorize the trial court to "borrow" § 4-160 (a) so as to allow it to determine that the state may be sued and, contrary to the claim of the plaintiff, § 4-160 (a) does not discriminate against the assertion of federal rights.

Argued May 11—decision released August 1, 1989

Action to recover damages for the wrongful death of the plaintiff's decedent, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Flanagan, J.*, granted the

motion to dismiss filed by the defendant state of Connecticut et al. and rendered judgment thereon; thereafter, the action was withdrawn against the named defendant, and the plaintiff appealed. *No error.*

Louis M. Winer, for the appellant (plaintiff).

Richard T. Couture, assistant attorney general, with whom, on the brief, were *Clarine Nardi Riddle*, acting attorney general, and *Joseph I. Lieberman*, former attorney general, for the appellees (defendant state of Connecticut et al.).

CALLAHAN, J. The issue presented in this appeal is whether the trial court erred in dismissing the plaintiff's complaint for money damages against the state of Connecticut and the commissioner of correction because the suit was barred by the doctrine of sovereign immunity.[1] The plaintiff contends that in this cause of action brought pursuant to 42 U.S.C. § 1983,[2] the Superior Court had the authority to waive sovereign immunity and to allow an action to proceed against the state even though the claims commissioner had not authorized the suit pursuant to General Statutes § 4-160 (a).[3] We disagree.

[1] Initially, the city of New Haven was named as a defendant. The suit against the city was subsequently withdrawn.

[2] "[42 U.S.C.] § 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[3] General Statutes (Rev. to 1985) § 4-160 (a) provides in pertinent part: "AUTHORIZATION OF ACTIONS AGAINST THE STATE. (a) When the claims commissioner deems it just and equitable, he may authorize suit against the state on any claim which, in his opinion, presents an issue of law or fact

The plaintiff, Jacob J. Krozser, administrator of the estate of Stephen F. Krozser, filed a complaint in the Superior Court seeking damages, pursuant to 42 U.S.C. §§ 1983 and 1988,[4] against the state of Connecticut and Raymond Lopes, in his official capacity as the commissioner of correction. The defendants moved to dismiss, claiming that sovereign immunity barred the plaintiff's action. The trial court granted the defendants' motion concluding that (1) the doctrine of sovereign immunity barred the complainant's claim against the state, and (2) the state is not a "person" within the meaning of 42 U.S.C. § 1983.[5] The plaintiff appealed to the Appel-

under which the state, were it a private person, could be liable. In each such action the claimant shall allege such authorization and the date on which it was granted. The state waives its immunity from liability and from suit in each such action and waives all defenses which might arise from the eleemosynary or governmental nature of the activity complained of. The rights and liability of the state in each such action shall be coextensive with and shall equal the rights and liability of private persons in like circumstances. . . ."

[4] "[42 U.S.C.] § 1988. PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS; ATTORNEY'S FEES

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extented to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[5] The plaintiff did not contest the trial court's ruling that the state is not a person within the meaning of 42 U.S.C. § 1983. Since we affirmed the

late Court. Thereafter, we transferred the appeal to ourselves pursuant to Practice Book § 4023. We find no error.

On June 12, 1985, Stephen F. Krozser died while incarcerated at the New Haven Community Correctional Center. On June 10, 1986, pursuant to General Statutes §§ 4-147 and 4-165b,[6] the plaintiff filed a notice of claim with the claims commissioner seeking permission to sue the state of Connecticut. In his notice of

trial court's ruling based upon the first ground, we did not address that issue. However, on June 15, 1989, the United States Supreme Court in *Will* v. *Michigan Department of State Police*, U.S. (57 U.S.L.W. 4677, June 13, 1989), ruled that a state or state official while acting in his official capacity is not a "person" within the meaning of § 1983.

[6] "[General Statutes] Sec. 4-147. NOTICE OF CLAIM. FILING FEES. Any person wishing to present a claim against the state shall file with the clerk of the office of the claims commissioner a notice of claim, in duplicate, containing the following information: (1) The name and address of the claimant; the name and address of his principal, if the claimant is acting in a representative capacity, and the name and address of his attorney, if the claimant is so represented; (2) a concise statement of the basis of the claim, including the date, time, place and circumstances of the act or event complained of; (3) a statement of the amount requested, and (4) a request for permission to sue the state, if such permission is sought. A notice of claim, if sent by mail, shall be deemed to have been filed with the office of the claims commissioner on the date such notice of claim is postmarked. Claims in excess of one thousand dollars shall be accompanied by a check or money order in the sum of twenty-five dollars payable to the treasurer, state of Connecticut. Claims for one thousand dollars or less shall be accompanied by a check or money order in the sum of ten dollars payable to the treasurer, state of Connecticut. Fees may be waived by the commissioner for good cause but such action by the commissioner shall not relieve the claimant from the obligation of filing his notice of claim in timely fashion within the statute of limitations under section 4-148. The clerk of the office of the claims commissioner shall promptly deliver a copy of the notice of claim to the attorney general. Such notice shall be for informational purposes only and shall not be subject to any formal or technical requirements, except as may be necessary for clarity of presentation and facility of understanding."

"[General Statutes] Sec. 4-165b. CLAIMS AGAINST THE STATE BY INMATES OF STATE CORRECTIONAL AND REFORMATORY INSTITUTIONS. (a) On and after May 3, 1976, any inmate of any institution of the department of correction or the department of children and youth services who suffers an injury which

claim and his subsequent complaint to the Superior Court, the plaintiff alleged that while the plaintiff's decedent was incarcerated at the correctional center the defendants were deliberately indifferent to, and failed to provide for, his serious medical needs. The plaintiff further alleged that the defendants' conduct was a violation of his decedent's rights under the eighth and fourteenth amendments to the United States constitution and directly resulted in his decedent's death.

For reasons that are not clear from the record, the claims commissioner never acted upon the plaintiff's request to sue the state.[7] Consequently, the plaintiff filed the instant action in the Superior Court, apparently because the two year statute of limitations for wrongful death, embodied in General Statutes § 52-555, was about to expire.[8]

On appeal, the plaintiff asserts that the trial court had the authority to waive the state's sovereign immunity in a § 1983 suit for money damages and therefore it erred when it dismissed his action. The plaintiff's argument is three-pronged. He first contends that a complainant need not exhaust his "administrative remedies" prior to bringing a § 1983 action in the state

results in a fatality or in a permanent handicap may file a claim against the state. Such claim shall be heard and decided in accordance with the provisions of this chapter.

"(b) All matters pending before the committee established pursuant to section 18-95 of the general statutes, revision of 1958, revised to 1975, on May 3, 1976, shall be construed as pending with the same status with the claims commissioner on said date."

[7] The plaintiff blames the death of the claims commissioner and the resultant delays for the lack of activity on his claim. The state claims that the plaintiff's allegation is "misleading in that it fails to disclose that the plaintiff has yet to comply with discovery requests filed by the defendants in March, 1987."

[8] At oral argument, the question was posed from the bench whether the plaintiff would be barred by the statute of limitations from asserting his 42 U.S.C. § 1983 claim against the state. Neither party briefed the issue. Accordingly, we will not decide it at this time.

court. He next claims that the state trial court may "borrow" applicable state law, pursuant to 42 U.S.C. § 1988, to supplement federal law. In this regard, the plaintiff argues that the Superior Court may "borrow" and apply General Statutes § 4-160 (a), which sets forth the standard to be used by the claims commissioner, to determine whether to authorize suit against the state. Finally, the plaintiff contends that chapter 53 of the General Statutes[9] "discriminates" against the assertion of his decedent's federal rights under 42 U.S.C. § 1983. We are unpersuaded.

" 'We have long recognized the common-law principle that the state cannot be sued without its consent. *Horton* v. *Meskill*, 172 Conn. 615, 623, 376 A.2d 359 (1977); *Textron, Inc.* v. *Wood*, 167 Conn. 334, 339, 355 A.2d 307 (1974). We have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. *Horton* v. *Meskill*, supra; *Textron, Inc.* v. *Wood*, supra; *Baker* v. *Ives*, 162 Conn. 295, 297, 294 A.2d 290 (1972); *Murphy* v. *Ives*, 151 Conn. 259, 262, 196 A.2d 596 (1963); *Anderson* v. *Argraves*, 146 Conn. 316, 320, 150 A.2d 295 (1959). Therefore, we have dealt with such suits as if they were solely against the state and have referred to the state as the defendant. *Anselmo* v. *Cox*, 135 Conn. 78, 79–80, 60 A.2d 767, cert. denied, 335 U.S. 859, 69 S. Ct. 132, 93 L. Ed. 405 (1948); *Rusch* v. *Cox*, 130 Conn. 26, 34, 31 A.2d 457 (1943).' (Footnote omitted.) *Sentner* v. *Board of Trustees*, 184 Conn. 339, 342–43 [439 A.2d 1033 (1981)]." *Fetterman* v. *University of Connecticut*, 192 Conn. 539, 550–51, 473 A.2d 1176 (1984).

The absolute bar of actions against the state on the ground of sovereign immunity has been modified by

[9] Chapter 53 includes General Statutes §§ 4-141 through 4-165b.

statute and by judicial decisions. "Sovereign immunity does not bar suits against state officials acting in excess of their statutory authority or pursuant to an unconstitutional statute. *Horton* v. *Meskill*, [supra, 624]." *Doe* v. *Heintz*, 204 Conn. 17, 31, 526 A.2d 1318 (1987). In addition, the state cannot use sovereign immunity as a defense in an action for declaratory or injunctive relief. Id. However, "[i]n the absence of legislative authority . . . we have declined to permit any monetary award against the state or its officials. *Fetterman* v. *University of Connecticut*, [supra, 550]; *State* v. *Chapman*, 176 Conn. 362, 365, 407 A.2d 987 (1978)." Id., 32. Further, " '[s]tatutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed.' *Berger, Lehman Associates, Inc.* v. *State*, 178 Conn. 352, 356, 422 A.2d 268 (1979), quoting *Spring* v. *Constantino*, 168 Conn. 563, 570, 362 A.2d 871 (1975)." *Duguay* v. *Hopkins*, 191 Conn. 222, 232, 464 A.2d 45 (1983).

When sovereign immunity has not been waived, the claims commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim. See General Statutes §§ 4-141 through 4-165b. The claims commissioner, if he deems it "just and equitable," may sanction suit against the state on any claim "which, in his opinion, presents an issue of law or fact under which the state, were it a private person, could be liable." General Statutes § 4-160 (a). "This legislation expressly bars suits upon claims cognizable by the claims commissioner except as he may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by the commissioner or other statutory provisions. General Statutes §§ 4-148 (b), 4-160." *Doe* v. *Heintz*, supra, 35–36.

The plaintiff is unable to point to any statute that waives the state's sovereign immunity in the present case. In addition, the plaintiff concedes that he has never received permission from the claims commissioner to sue the state. He argues, however, that under *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982), he is not required to obtain the consent of the claims commissioner prior to bringing his § 1983 claim in the Superior Court. In *Patsy*, the United States Supreme Court held that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." Id., 516. Consequently, the plaintiff contends he need not obtain permission prior to proceeding against the state in a § 1983 action. We disagree.

Section 1983 does not abrogate the common law doctrine of sovereign immunity. "In *Owen* v. *Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673, reh. denied, 446 U.S. 993, 100 S. Ct. 2979, 64 L. Ed. 2d 850 (1980), the United States Supreme Court stated that '[w]here the immunity claimed by the defendant was well established at common law at the time Section 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity.' Id., 638. The doctrine of sovereign immunity was well established at common law at the time § 1983 was enacted. It is supported by a strong policy reason; that is, to prevent the imposition of enormous fiscal burdens on states. As concluded by the court in *Quern* v. *Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979), Congress did not intend 'by the general language of Section 1983 to override the traditional sovereign immunity of the States.' Id., 341." *Fetterman* v. *University of Connecticut*, supra, 551–52.

The plaintiff, however, contends that the trial court and the claims commissioner have concurrent jurisdiction to authorize suits against the state and therefore he should not be required to first exhaust what he denotes as his "administrative remedy" under chapter 53 of the General Statutes prior to commencing suit. We disagree. Before a claimant may pursue any monetary claim against the state, if the doctrine of sovereign immunity is applicable, the state must consent to be sued. *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *Fetterman* v. *University of Connecticut*, supra, 550. The claims commissioner, as previously noted, may waive that immunity, pursuant to General Statutes § 4-160 (a), and consent to suit. Until that happens, however, the Superior Court has no jurisdiction to hear any such monetary claim. " 'A statute giving a right to costs in general terms will not be construed to include an award against the State, because the State is invested with the immunities from legal process, mesne and final, which at common law belonged to the King and there would be no power in the court to enforce its decree.' [*State* v. *Chapman*, supra, 365]; *State* v. *Anderson*, 82 Conn. 392, 393–94, 73 A. 751 (1909). '[I]t is a general principle that what courts cannot enforce they cannot decree.' *State* v. *Anderson*, supra, 393; see *Pellegrino* v. *O'Neill*, 193 Conn. 670, 683, 480 A.2d 476, cert. denied, 469 U.S. 875, 105 S. Ct. 236, 83 L. Ed. 2d 176 (1984)." *Doe* v. *Heintz*, supra, 32–33. "The question whether the principles of governmental immunity from suit and liability are waived is a matter for legislative, not judicial, determination. *Rogan* v. *Board of Trustees*, 178 Conn. 579, 582, 424 A.2d 274 (1979); *Bergner* v. *State*, 144 Conn. 282, 286–87, 130 A.2d 293 (1957)." *Duguay* v. *Hopkins*, supra, 228.

In keeping with that premise, the entire legislative scheme of chapter 53, which authorizes claims against the state, makes clear that it is the claims commissioner, pursuant to legislation, that can waive sovereign immunity and not the courts. The legislation pertinent to this appeal expressly provides that, "[w]hen the claims commissioner deems it just and equitable, he may authorize suit against the state"; General Statutes § 4-160 (a); and that when "any inmate of any institution of the department of correction" brings a claim against the state for an injury which results in a fatality, that claim must be heard and decided in accordance with the provisions of chapter 53. General Statutes § 4-165b. The Superior Court, therefore, has no authority to hear a claim for monetary damages against the state when the doctrine of sovereign immunity is applicable.[10] That jurisdiction, in the first instance, resides by statute solely in the claims commissioner.

The plaintiff maintains, however, that 42 U.S.C. § 1988 confers jurisdiction on the Superior Court to waive the state's sovereign immunity and allow it to be sued. Specifically, the plaintiff contends that § 1988 authorizes the trial court to "borrow" General Statutes § 4-160 (a) to determine whether his claim presents an issue under which the state, were it a private person, could be liable. The plaintiff claims that by thus

[10] Moreover, this reading of the statute is consistent with our interpretation of chapter 53 in *Circle Lanes of Fairfield, Inc.* v. *Fay*, 195 Conn. 534, 489 A.2d 363 (1985). In *Circle Lanes of Fairfield, Inc.*, we concluded that the Superior Court lacked jurisdiction to hear appeals from the claims commissioner because General Statutes § 4-164a expressly exempted the claims commissioner from the operation of General Statutes § 4-183, the provision of the Uniform Administrative Procedure Act that permits an appeal to the Superior Court. Further, when the commissioner recommends payment of a claim against the state in excess of $7500, it is the legislature, not the court, that reviews the commissioner's decision. See General Statutes § 4-159.

allowing the trial court to authorize suit against the state we would be fostering the "goal of compensation" underlying § 1983. We disagree.

Section 1988 "recognizes that in certain areas 'federal law is unsuited or insufficient "to furnish suitable remedies" '; federal law simply does not 'cover every issue that may arise in the context of a federal civil rights action.' *Moor* v. *County of Alameda*, 411 U.S. 693, 703 [93 S. Ct. 1785, 36 L. Ed. 2d 596] (1973) [reh. denied, 412 U.S. 963, 93 S. Ct. 2999, 37 L. Ed. 2d 1012 (1973), overruled on other grounds, *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)], quoting 42 U.S.C. § 1988." *Robertson* v. *Wegmann*, 436 U.S. 584, 588, 98 S. Ct. 1991, 56 L. Ed. 2d 554 (1978). "The century-old Civil Rights Acts do not contain every rule of decision required to adjudicate claims asserted under them." *Burnett* v. *Grattan*, 468 U.S. 42, 47, 104 S. Ct. 2924, 82 L. Ed. 2d 36 (1984). Federal courts under § 1988 may therefore look to state law to fill the void. Id., 48; *Robertson* v. *Wegmann*, supra.

"Most decisions concerning the borrowing of state law . . . have arisen from [a] need to borrow provisions, such as statutes of limitations, tolling policies, and survival rules, that serve the exclusive purpose of defining that point where the right to maintain a cause of action ends." *Brown* v. *United States*, 742 F.2d 1498, 1505 (D.C. Cir. 1984), cert. denied sub nom. *District of Columbia* v. *Brown*, 471 U.S. 1073, 105 S. Ct. 2153, 85 L. Ed. 2d 509 (1985). Section 1988 "instructs federal courts as to what law to apply in causes of actions arising under federal civil rights acts. But . . . the section, without more, was [not] meant to authorize the wholesale importation into federal law of state causes of action—not even one purportedly designed for the protection of federal civil rights." *Moor* v. *County of Alameda*, supra, 703–704. Section 1988 applies only

when federal law is inapplicable or in some way deficient. *Brown* v. *United States,* supra, 1504. The fact that the plaintiff cannot, without consent, sue the state in an action under § 1983 for money damages is not, however, simply a matter of a deficiency in federal law. Sovereign immunity is a matter of substantive state law that has been consistently recognized as not having been abrogated by § 1983. See discussion, supra.

Next, the plaintiff claims that chapter 53 discriminates against the assertion of his federal rights. In support of his argument, the plaintiff relies primarily on the recent United States Supreme Court case of *Felder* v. *Casey,* U.S. , 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988). *Felder* is inapposite. The state notice-of-claim statute struck down in *Felder* produced "different outcomes in § 1983 litigation based solely on whether the claim [was] asserted in state or federal court . . . . " Id., 2307. *Felder* involved a claim under § 1983 against the city of Milwaukee and its police officers. The notice-of-claim statute in question in that case imposed restrictions on a claimant which raised a § 1983 cause of action against a municipality and its officers in the state court, but did not apply to such claims if brought by the claimant in the federal court. Id., 2309. Consequently, the statute made it more difficult for the claimant to sue under § 1983 in the state court. The present case poses no such problem. As the plaintiff conceded at oral argument, the eleventh amendment would be a complete bar to his cause of action in the federal court.[11] *Pennhurst State School*

[11] The eleventh amendment to the United States constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

We note that in *Patsy* v. *Florida Board of Regents,* 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982), the United States Supreme Court did not address whether the eleventh amendment would nevertheless bar

& Hospital v. *Halderman,* supra, 98; *Fitts* v. *McGhee,* 172 U.S. 516, 524, 19 S. Ct. 269, 43 L. Ed. 535 (1899); *Hans* v. *Louisiana,* 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890). Likewise, the doctrine of sovereign immunity would bar the plaintiff's cause of action in the state court. The plaintiff, therefore, is treated equally in both jurisdictions, avoiding the problem addressed by the United States Supreme Court in *Felder* v. *Casey,* supra.

There is no error.

In this opinion the other justices concurred.

---

the suit on the basis of the sovereign immunity of the state. "Nothing in this opinion precludes the Board of Regents from raising its Eleventh Amendment claim on remand." Id., 515–16 n.19.

IN THE SUPREME COURT OF THE
STATE OF CONNECTICUT

JACOB J. KROZSER, Administrator
of the Estate of Stephen F. Krozser,
Appellant,

v. No. 13589

STATE OF CONNECTICUT,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JACOB J. KROZSER, Administrator of the Estate of Stephen F. Krozser, the appellant above-named, hereby appeals to the Supreme Court of the United States from the Final Judgment of the Supreme Court of the State of Connecticut, affirming the dismissal of the complaint, entered in this action on August 1, 1989.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

CHIEF CLERK
SUPREME COURT
APPELLATE COURT
Oct 27 9:22 AM '89
DRAWER Z, STATION A
HARTFORD, CT 06106
(Seal)

/s/ Louis Marshall Winer
Louis Marshall Winer
2911 Dixwell Avenue
P.O. Box 5619
Hamden, CT 06518
(203) 281-3142
— *Counsel for Appellant* —

Dated: October 27, 1989.

CERTIFICATE OF SERVICE

I, Louis Marshall Winer, a member of the bar of this Court and a member of the bar of the Supreme Court of the United States, hereby certify that on this 27th day of October, 1989, three true copies of the above Notice of Appeal were deposited in the United States Mails, first-class postage prepaid, addressed to counsel for all parties to the proceedings below, namely three copies addressed to: Clarine Nardi Riddle, Esquire, Attorney General of the State of Connecticut, 30 Trinity Street, Hartford, Connecticut 06106, and to Richard T. Couture, Esquire, Assistant Attorney General, MacKenzie Hall, 110 Sherman Street, Hartford, Connecticut 06105, counsel for appellee State of Connecticut and for Raymond

M. Lopes, in his Official Capacity as Commissioner of Correction of the State of Connecticut, a defendant below; and to Brian Murphy, Esquire, Corporation Counsel of the City of New Haven, and Carolyn R. Spencer, Assistant Corporation Counsel, 95 Orange Street, New Haven, Connecticut 06510, counsel for the City of New Haven, said City having been a defendant below. I further certify that all parties required to be served have been served.

/s/ Louis Marshall Winer
Louis Marshall Winer
2911 Dixwell Avenue
P.O. Box 5619
Hamden, CT 06518
(203) 281-3142
— Counsel for Appellant —

Return Date: July 14, 1987

JACOB J. KROZSER, Administrator of the Estate of Stephen F. Krozser,	: SUPERIOR COURT
Plaintiff,	:
vs.	:
THE CITY OF NEW HAVEN, STATE OF CONNECTICUT, and RAYMOND M. LOPES, in his Official Capacity as Commissioner of Correction of the State of Connecticut,	: JUDICIAL DISTRICT : OF NEW HAVEN : AT NEW HAVEN
Defendants.	: JUNE 9, 1987

COMPLAINT

1. Prior to his death on June 12, 1985, at the New Haven Community Correctional Center, located on Whalley Avenue in the City of New Haven, STEPHEN F. KROZSER was a resident of the Town of Beacon Falls. JACOB J. KROZSER, a resident of the City and Town of Bridgeport, was duly appointed and serves as the Administrator of the Estate of Stephen F. Krozser, and brings this action in such capacity as plaintiff.

2. THE CITY OF NEW HAVEN is a municipality organized and existing under the laws of the State of Connecticut. Said municipality and the STATE OF CONNECTICUT are subject to the constitution and laws of the United States and the State of Connecticut as pertinent and applicable to the causes herein alleged. Defendant THE CITY OF NEW HAVEN, is also subject to its own City Code and City Charter.

3. RAYMOND M. LOPES is a defendant in this action in his official capacity as Commissioner of Correction of the State of Connecticut. At all pertinent times, defendant LOPES served as such Commissioner with the powers, duties, and responsibilities, provided under Chapter 325 of the General Statutes of the State of Connecticut.

4. Plaintiff's decedent, STEPHEN F. KROZSER, was an alcoholic at all times pertinent herein. On or about June 8, 1985, he was taken into custody and was at that time suffering from *delirium tremens*. As a consequence of such conditions, he then and thereafter until his death had serious medical needs. During the period from June 8, 1985, until his death he was held in the custody of either or both of: the Department of Police Services of THE CITY OF NEW HAVEN at its lock-up or elsewhere; and the Department of Correction of the STATE OF CONNECTICUT at the New Haven Community Correctional Center. For brief periods during that time, said STEPHEN F. KROZSER was held in custody in transit, in court for arraignment, or at the emergency room of Yale-New Haven Hospital.

5. Under Chapter 304c of the General Statutes of the State of Connecticut, it is the policy of the State that alcoholics should not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society. It is further the duty of defendant Commissioner Lopes and the executive director of the Connecticut Alcohol and Drug Abuse Commission to establish treatment and rehabilitation programs for alcoholics confined in correctional institutions.

6. In connection with the actions and omissions of defendants and their agents hereinafter alleged, said defendants and their agents were acting under color of state law. The

actions and omissions of defendants hereinafter alleged constituted deliberate indifference to the serious medical needs of said STEPHEN F. KROZSER and, as such, violated the provisions of, and constituted an infringement of the rights and immunities of said STEPHEN F. KROZSER established under, the Eighth and Fourteenth Amendments to the United States Constitution.

7. During the period of the above alleged custody, said STEPHEN F. KROZSER was moved from place to place, was not duly placed under supervision, medication, observation, and monitoring, as called for by his medical condition and needs, and was introduced into the processes of the criminal justice system with the proximate result that on the morning of June 12, 1985, he died unobserved and unmonitored under his bed on the floor at the New Haven Community Correctional Center. The actions and omissions of defendants leading to such consequence were a result of an implicit policy, participated in by all defendants and for which all defendants are responsible and liable, of deliberate indifference to the serious medical needs of alcoholics and persons suffering from *delirium tremens* and of failing reasonably to monitor and require compliance with reasonable, effective standards of care and custody for such persons. As a proximate result of said actions, omissions, and policies, plaintiff's decedent suffered the loss of his life, the loss of life's employment, loss of earnings and earning capacity, and the pain and distress suffered from the knowledge that he was about to die from the lack of due care to which he was subjected.

8. Plaintiff brings this action under the provisions of Sections 1983 and 1988 of Title 42 of the United States Code. Under those statutes and under the Civil Rights Acts, generally, of the United States Code, this Court has jurisdiction concurrent with the jurisdiction of the courts of the United States in connection with the claims and causes herein alleged.

9. Under Chapter 53 of the General Statutes of the State of Connecticut, an administrative officer and procedure is and has been established to allow for the authorization of actions against the State and to provide for the waiver of the State's

defense of sovereign immunity in accordance with the provisions therein. Under Sections 1983 and 1988 of Title 42 of the United States Code, plaintiff need not exhaust such administrative remedies and is entitled to commence this action directly for this Court's determination in accordance with the provisions of said Chapter 53 that the State may be sued and its immunity waived.

10. To the extent that any defendant herein claims that he or it is entitled to avail himself or itself of the defense of sovereign immunity, the recognition of such claim or defense violates and infringes upon the rights of plaintiff under the Equal Protection Clauses of the constitutions of the United States and of the State of Connecticut, in the light of the fact that the State has by statute waived such defense in connection with persons in the custody of or under the supervision of the Commissioner of Health Services or the Commissioner of Mental Retardation, and there is no rational or supportable distinction between or among the conditions or illnesses subject to the jurisdiction of said Commissioners and the condition of alcoholism or *delirium tremens* which should be cognizable under the jurisdiction of the Commissioner or */sic/* Mental Health.

WHEREFORE plaintiff demands judgment for damages, exemplary damages, attorney's fees, and such equitable relief by way of injunction as may be appropriate in the premises.

PLAINTIFF JACOB J. KROZSER,
Administrator of the Estate
of STEPHEN F. KROZSER

By WINER & SULZBACH

By /s/ Louis M. Winer
Louis M. Winer
2911 Dixwell Avenue
P.O. Box 5619
Hamden, CT 06518
Juris No. 68160
Tel. No. (203) 281-3142
— His Attorneys —

NO. CV 87 0260094

JACOB J. KROZSER, Administrator	:	SUPERIOR COURT
Plaintiff,	:	
V.	:	JUDICIAL DISTRICT
	:	OF NEW HAVEN
CITY OF NEW HAVEN, ET AL	:	AT NEW HAVEN
Defendants.	:	AUGUST 10, 1987

MOTION TO DISMISS

The defendants, State of Connecticut and Commissioner Raymond M. Lopes, hereby move the Court, pursuant to Section 143 of the Connecticut Practice Book, to dismiss the complaint for the following reasons:

1. In that this is an action for money damages against the State of Connecticut and the Commissioner of Correction in his official capacity, the action is barred by the doctrine of sovereign immunity.

2. The State is not a "person" within the meaning of 42 U.S.C. § 1983.

ORAL ARGUMENT *NOT* REQUESTED
TESTIMONY *NOT* REQUIRED

RESPECTFULLY SUBMITTED,
DEFENDANTS
STATE OF CONNECTICUT AND
COMMISSIONER RAYMOND M. LOPES

BY: JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

/s/ Richard T. Couture
Richard T. Couture
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, CT 06111
Tel. (203) 566-7570
Juris No. 85400

Supreme Court, U.S.
FILED
NOV 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-704

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen Krozser,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

RICHARD T. COUTURE
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Telephone: (203) 566-7570

Counsel of Record
for Respondent

QUESTIONS PRESENTED

1. Whether sovereign immunity may serve as a bar to an action under 42 U.S.C. § 1983 for money damages brought in a state court against the State and a state official sued in his official capacity?

2. Whether a State or its officials acting in their official capacities are "persons" under 42 U.S.C. § 1983?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR DENIAL OF THE PETITION 4

CONCLUSION 9

APPENDIX

March 14, 1988, Opinion of the Superior Court on Defendants' Motion to Dismiss 1A

TABLE OF AUTHORITIES

Cases: **Page(s)**

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142 (1985) 6

Della Grotta v. State of R.I., 781 F.2d 343 (1st Cir. 1986) 6

Doe v. Heintz, 204 Conn. 17, 526 A.2d 1318 (Conn. 1987) 6

Felder v. Casey, ____ U.S. ____, 108 S.Ct. 2302 (1988) 7

Karchefske v. Dept. of Mental Health, 143 Mich. 1, 371 N.W.2d 876 (Mich. App. 1985) 4

Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099 (1985) 7

Kristensen v. Strinden, 343 N.W.2d 67 (N.D. 1983) 4

Kroszer v. New Haven, 212 Conn. 415, 562 A.2d 1080 (1989) 2, 3, 6

Martinez v. California, 444 U.S. 277, 100 S.Ct. 553 (1980) 5

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978) 7

Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785 (1973) 7

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975) 6

TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398 (1980) 4

Patsy v. Florida Board of Regents, 457 U.S. 496, 102 S.Ct. 2557 (1982) 2, 6

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900 (1984) 7

Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139 (1979) 4

Ramah Navajo School Bd. v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M. App. 1986) 4

Thiboutot v. State, 405 A.2d 230 (Me. 1979), *aff'd sub nom. Main v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502 (1980) 4

Will v. Michigan Department of State Police, ___ U.S. ___, 109 S.Ct. 2304 (1989) 3, 4, 8

Federal Statutes:

42 U.S.C. § 1983 . . . . . *passim*

42 U.S.C. § 1988 . . . . . *passim*

Connecticut General Statutes:

Conn. Gen. Stat. § 4-160 . . . . . 1, 3, 6

Conn. Gen. Stat. § 4-165 . . . . . 1, 5

OPINIONS BELOW

The opinion of the Connecticut Superior Court is not reported. It is reprinted in the Appendix hereto at 1A.[1] The opinion of the Connecticut Supreme Court is reported at 212 Conn. 415, 562 A.2d 1080 (1989) and is reprinted in J.S. App. 1A–13A.

JURISDICTION

The decision of the Connecticut Supreme Court was entered on August 1, 1989. The Petitioner claims that this Court has appellate jurisdiction under 28 U.S.C. § 1257(2). Section 1257 has been amended, however, to eliminate "appeals" from the highest state courts to this Court. Under the new § 1257(a) which became effective on June 27, 1988, final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by this Court only by writ of certiorari. Counsel for the Respondent has been instructed by the Clerk's office that the Jurisdictional Statement filed in this case will be treated as though it were a Petition for Writ of Certiorari.

STATUTORY PROVISIONS

The underlying action was brought pursuant to 42 U.S.C. §§ 1983 and 1988 and these statutory provisions are set forth in footnotes 2 and 4 of the opinion of the Connecticut Supreme Court which have been reprinted at J.S. App. 2A–3A. Sections 4-160, 4-165 and 4-165b of the Connecticut General Statutes are set forth at page 4 of Petitioner's Jurisdictional Statement.

---

[1] References to the Appendix attached hereto will be noted by the sign "A". The sign "J.S. App." refers to the appendix filed with the Jurisdictional Statement.

STATEMENT OF THE CASE

By complaint dated June 9, 1987, Petitioner brought an action in the Connecticut Superior Court seeking money damages pursuant to 42 U.S.C. §§ 1983 and 1988. Named as defendants in this action were the City of New Haven, the State of Connecticut and "Raymond M. Lopes, in his official capacity as Commissioner of Correction of the State of Connecticut." (J.S. App. 15A-16A). At no time did the Petitioner seek to include as defendants any state officials in their individual or personal capacities. Indeed, Petitioner acknowledges at page ii of his Jurisdictional Statement that the action abated as to Commissioner Raymond Lopes upon his departure from office, and that no substitution was made of his successor in office. Since the Petitioner withdrew the action as to the City of New Haven, the Respondent State of Connecticut remains as the only defendant in this case.

On August 10, 1987, the State of Connecticut and Commissioner Raymond Lopes moved to dismiss the action on the grounds that (1) the action for money damages against the State and the Commissioner of Correction in his official capacity was barred by the doctrine of sovereign immunity, and (2) the State is not a "person" within the meaning of 42 U.S.C. § 1983. (J.S. App. 19A.) In its Memorandum of Decision dated March 14, 1988, the trial court granted the motion to dismiss concluding that the action was barred by sovereign immunity and that the State is not a "person" under 42 U.S.C. § 1983. (A. 2A-3A.) In his appeal to the Connecticut Supreme Court, the Petitioner did not challenge the trial court's ruling that the State is not a person within the meaning of 42 U.S.C. § 1983. *See, Krozser v. New Haven, supra,* 212 Conn. at 417 n.5; J.S. App. 3A-4A. Instead, he launched a three-pronged attack on the trial court's ruling regarding sovereign immunity. He first argued that under *Patsy v. Florida Board of Regents,* 457 U.S. 496, 102 S.Ct. 2557 (1982), he should not be required to obtain the authorization of the Connecticut Claims Commissioner as a prerequisite to filing his § 1983 suit for money damages against the State in the

State Superior Court. He next urged that the trial court should itself have authorized suit against the State by simply borrowing Conn. Gen. Stat. § 4-160(a) which permits the Claims Commissioner to waive the State's sovereign immunity. The Petitioner maintained that such a result could be accomplished pursuant to the "borrowing" provisions of 42 U.S.C. § 1988. Finally, he claimed that the requirement that he seek permission to sue the State for money damages poses an impermissible burden on the exercise of his decedent's federal civil rights under 42 U.S.C. § 1983. (J.S. App. 5A–6A.)

The Supreme Court of Connecticut rejected the Petitioner's challenges to the legislative scheme which authorizes the Claims Commissioner to waive the State's sovereign immunity and grant permission to sue the State for money damages. Since the Petitioner had not received permission to sue the State, the Court ruled that this action for money damages against the State of Connecticut and the Commissioner of Correction in his official capacity was barred by the doctrine of sovereign immunity. Having based its ruling on sovereign immunity, the Court declined to address the issue of whether the State was a person under 42 U.S.C. § 1983. The Court noted, however, that this Court in *Will v. Michigan Department of State Police*, ____ U.S. ____, 109 S.C. 2304 (1989) had recently ruled that neither a state nor state officials acting in their official capacities are "persons" within the meaning of § 1983. *Krozser v. New Haven, supra*, 212 Conn. at 417–18 n.5; J.S. App. 3A–4A.

REASONS FOR DENIAL OF THE PETITION

1. The Connecticut Supreme Court's Decision Regarding The Availability Of Sovereign Immunity As A Bar To A Section 1983 Action Is Not In Conflict With The Decisions Of Any Other State Court Of Last Resort, Any Federal Court Of Appeals, Or Of This Court.

The Connecticut Supreme Court upheld the dismissal of this § 1983 action for money damages on the grounds that the action against the State and the Commissioner of Correction in his official capacity was barred because of the State's sovereign immunity from suits seeking monetary damages. (J.S. App. 2A.) It is well established that § 1983 does not abrogate the common law doctrine of sovereign immunity. *Will v. Michigan Department of State Police, supra,* 109 S.Ct. at 2310 ("We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent."); *Owen v. City of Independence,* 445 U.S. 622, 638, 100 S.Ct. 1398, 1409 (1980) (Section 1983 construed to incorporate immunities well established at common law at the time the statute was enacted.); *Quern v. Jordan,* 440 U.S. 332, 341, 99 S.Ct. 1139, 1145 (1979) (Congress did not intend "by the general language of § 1983 to override the traditional sovereign immunity of the States.").

Other state courts of last resort which have considered this issue have permitted sovereign immunity to be raised as a bar to § 1983 claims seeking monetary awards from the State, its agencies and officials. *See, e.g., Ramah Navajo School Bd. v. Bureau of Revenue,* 104 N.M. 302, 720 P.2d 1243, 1250 (N.M. App. 1986); *Karchefske v. Dept. of Mental Health,* 143 Mich. 1, 371 N.W.2d 876, 881 (Mich. App. 1985); *Kristensen v. Strinden,* 343 N.W.2d 67, 75–77 (N.D. 1983); *Thiboutot v. State,* 405 A.2d 230, 237 (Me. 1979), *aff'd sub nom Maine v. Thiboutot,* 448 U.S. 1, 100 S.Ct. 2502 (1980). Thus, the decision of the Connecticut Supreme Court is consistent with applicable federal and state case law which have construed

§ 1983 as incorporating the traditional sovereign immunity of the states.

In his Jurisdictional Statement, the Petitioner refers to Conn. Gen. Stat. § 4-165 which provides that a person having a complaint for damage or injury, not wanton, reckless or malicious, caused by a state officer or employee in the discharge of his duties or within the scope of his employment, shall present it to the Claims Commissioner as a claim against the State. He argues that by virtue of this statute, any suit for money damages against a state official under § 1983, whether in the official's individual or official capacity, would be deemed barred by the doctrine of sovereign immunity. The Petitioner, however, has not sued any state officials in their individual or personal capacity. Had he chosen to bring this § 1983 action against state officials in their individual capacities and had such an action been dismissed based on the provisions of Conn. Gen. Stat. § 4-165, then he might have had a valid claim that the conduct of a person acting under color of state law which is wrongful under § 1983 cannot be immunized by state law. *See, Martinez v. California*, 444 U.S. 277, 284, n.8, 100 S.Ct. 553, 558, n.8 (1980). Since this is not an individual-capacity suit, however, the issue of whether and to what extent a state may confer upon an individual immunity from suit under § 1983 has no relevance to the rulings of the Connecticut Supreme Court in this case which the Petitioner seeks to have reviewed.

2. Petitioner's Challenge To Connecticut's Legislative Scheme For Authorizing Claims For Money Damages Against The State Raises No Significant Issues Of Federal Law.

Although the issue of whether Congress intended in enacting § 1983 to abrogate the State's sovereign immunity is a question of federal law, once it has been determined that the federal law itself has not abrogated the State's sovereign immunity, the question of whether and to what extent a state

has waived its sovereign immunity to suit in state court is a matter of state legislative intent on which the highest court of the state speaks with finality. *See, e.g., Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 3146-47 (1985); *Mullany v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 1886 (1975); *Della Grotta v. State of R.I.,* 781 F.2d 343, 347 (1st Cir. 1986). In this case, the Petitioner focuses his attack on the process established by Connecticut's legislature for waiving the State's sovereign immunity.

The Petitioner first argues that under *Patsy v. Florida Board of Regents, supra,* he should not be required to pursue what he denotes as his "administrative remedy" of seeking the authorization of the Claims Commissioner as a prerequisite to bringing an action in the Superior Court for money damages against the State. The Connecticut Supreme Court has consistently held, however, that the Superior Court has no jurisdiction to hear any monetary claims against the State which are cognizable by the Claims Commissioner unless and until the Claims Commissioner waives the State's sovereign immunity and consents to suit. *Krozser v. New Haven, supra,* 212 Conn. at 421-424, 562 A.2d at 1083-85, J.S. App. 7A-10A; *Doe v. Heintz,* 204 Conn. 17, 35-36, 526 A.2d 1318, 1328 (Conn. 1987). The procedure established for presenting a claim to the Claims Commissioner is not merely an alternative administrative remedy adopted to foster a policy of judicial restraint in deferring to alternative administrative remedies. It is the only means by which a claimant can seek permission to sue the State for money damages on claims cognizable by the Claims Commissioner. Indeed, in *Patsy v. Florida Board of Regents, supra,* 457 U.S. at 515-16 n.19, this Court noted that exhaustion and waiver of the State's immunity were two separate issues.

Petitioner next suggests that under the borrowing provisions of 42 U.S.C. § 1988, the Superior Court should have borrowed Conn. Gen. Stat. § 4-160(a) and itself determined whether or not to waive the State's immunity and authorize suit. Since Congress in enacting § 1983 refused to override

the State's Eleventh Amendment immunity or traditional sovereign immunity, it cannot be argued that this refusal constitutes a deficiency in the federal civil rights scheme. Waiver of sovereign immunity is a matter of substantive state law. Section 1988 cannot be used in an attempt to create a cause of action where none exists, "[a]nd § 1988, in light of the express limitations contained within it, cannot be used to accomplish what Congress clearly refused to do in enacting § 1983." *Moor v. County of Alameda*, 411 U.S. 693, 710, 93 S.Ct. 1785, 1796 (1973).

Finally, Petitioner argues that requiring him to pursue his claim for money damages against the State with the Claims Commissioner imposes an impermissible burden upon the assertion of his decedent's federal civil rights under § 1983. The Petitioner cites *Felder v. Casey*, ____ U.S. ____, 108 S.Ct. 2302 (1988) in support of his argument. *Felder* involved a suit under § 1983 against a municipality and its police officers. While municipalities may be sued directly under § 1983 for money damages in the federal courts, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035 (1978), the Eleventh Amendment bars such claims in federal courts against states or state officials in their official capacity. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 908 (1984); *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107 (1985). The notice-of-claim statute in *Felder* was struck down because its enforcement would have produced "different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court. . . ." *Id.*, at 2307. In the present case, the Petitioner's claim would be barred in both the state and federal courts. Therefore, the state statutes which establish the authority of the Claims Commissioner to permit money damage suits against the State do not in any way discriminate against the assertion of Petitioner's decedent's federal civil rights under § 1983.

3. The Questions Which Petitioner Seeks To Have Reviewed Regarding Sovereign Immunity And Waiver Of Sovereign Immunity Are Irrelevant In View Of This Court's Decision In *Will v. Michigan Department of State Police*, 109 S.Ct. 2304.

In *Will v. Michigan Department of State Police, supra*, 109 S.Ct. at 2312, this Court held "that neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Because a state and its officials acting in their official capacities are not persons under § 1983 and are thus not within the group of defendants against whom a § 1983 action for money damages may be brought, the issues raised by the Petitioner regarding the procedures established by Connecticut for the waiver of the State's sovereign immunity are irrelevant. States and state officials acting in their official capacity are not liable for money damages under § 1983 regardless of whether the State has waived its sovereign immunity from suit.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

RICHARD T. COUTURE
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Telephone: (203) 566-7570

Counsel of Record for Respondent

November 23, 1989

No. 89-704

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen Krozser,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

APPENDIX TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

NO. 260094	:	SUPERIOR COURT
JACOB J. KROZSER, ADM.	:	JUDICIAL DISTRICT
v.	:	OF NEW HAVEN
THE CITY OF NEW HAVEN, ET AL.	:	MARCH 14, 1988

MEMORANDUM OF DECISION

The complaint in the instant action which is brought under § 1983 and § 1988 of Title 42 U.S.C. alleges in substance that the plaintiff's decedent who was an alcoholic and then suffering from delirium tremens died while in custody of the defendants as a result of inadequate medical care in violation of his constitutional rights.

Suit has been instituted against the City of New Haven, The State of Connecticut and Raymond Lopes in his official capacity as Commissioner of Corrections.

The defendants, State of Connecticut and Raymond Lopes in his official capacity as Commissioner of Corrections, have filed a Motion to Dismiss this action on the grounds that the instant action is barred by the doctrine of sovereign immunity and that the state is not a person within the meaning of 42 U.S.C. § 1983.

The motion filed by said defendants relies entirely upon the allegations of the complaint and does not seek to introduce any additional facts outside of the record. Section 143 Conn. Practice Book. The defense of sovereign immunity may be raised in a Motion To Dismiss an action against the state. *Duguay v. Hopkins,* 191 Conn. 222, 227; *Fetterman v. University of Connecticut,* 192 Conn. 539, 550.

"The state is immune from suit unless it consents to be sued by appropriate legislation waiving sovereign immunity in

certain prescribed cases." *Duguay v. Hopkins,* supra p. 227; *Fetterman v. University of Connecticut,* supra, 550; *Sentner v. Board of Trustees,* 184 Conn. 339, 442; *Horton v. Meskill,* 172 Conn. 615, 623. Because the state can act only through its officers and agents, a suit against a state officer such as the defendant Lopes herein concerning a matter in which the officer represents the state is in effect, against the state. *Sentner v. Board of Trustees,* supra p. 342. Thus a suit against an officer of a state in his official capacity where the state is the real party against whom relief is sought and where judgment for the plaintiff, although nominally against the officer as an individual, would operate to control the action of the state or subject it to liability is barred. *Fetterman v. University of Connecticut,* supra p. 552.

The enactment of § 1983 of Title 42 U.S.C. did not "override the traditional sovereign immunity of the states." *Fetterman v. University of Connecticut,* supra p. 552 quoting from the court's opinion in *Quern v. Jordon,* 440 U.S. 332, 341.

Hence sovereign immunity is still an effective defense to a suit under § 1983, Title 42 U.S.C. against the state itself and an officer of the state in his official capacity seeking money damages.

The plaintiff has not alleged that the state has consented to such a suit.

The claim under 42 U.S.C. § 1988 must fail because the § 1983 action does not exist as a matter of law. 42 U.S.C. § 1988 provides in substance that in any action to enforce a provision of § 1983, supra the court may allow the *prevailing* party a reasonable attorney's fee (emphasis added). *Kentucky v. Graham,* 105 S.Ct. 3099, 3105.

The defendants have also moved to dismiss on the grounds that the State is not a "person" within the meaning of 42 U.S.C. § 1983. In *Pavlak v. Duffy,* 48 F.R.D. 396 (1969) the United States District Court for the District of Connect-

icut concluded that "[a] suit under 42 U.S.C. § 1983 must be against a person. A state is not a person for the purposes of this statute. *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961)." For other decisions which declare that the state is not a person within the meaning of § 1983, *see State of Connecticut v. Mobilia, Inc.*, 65134, J.D. of New London at Norwich, Memorandum of Decision on Motion to Dismiss, October 28, 1983, Mack, J., *Williford v. California*, 352 F.2d 474 (1965); *Lawson v. Rockingham County*, 359 F. Supp. 171 (1973); *Hahn v. Ingram*, 362 F. Supp. 982 (1973); *Needleman v. Bohlen*, 386 F. Supp. 741 (1974); *County of Lancaster v. Philadelphia Electric Co.*, 386 F. Supp. 934 (1975); *Florida Businessmen for Free Enterprise v. Florida*, 499 F. Sup. 346, aff'd 673 F.2d 1213 (1980).

The Motion to Dismiss filed by the defendants State of Connecticut and Raymond M. Lopes as Commissioner of Corrections was date stamped by the Clerk's office, August 12, 1987.

Section 143 Conn. Practice Book provides that if an adverse party objects to this motion he shall, at least five days before the motion is to be considered on the short calendar file a memorandum of law and that a failure to file such memorandum in a timely fashion shall be deemed by the court as consent to the granting of the motion. The filing of such a memorandum is mandatory. *Burton v. Planning Commission*, 13 Conn. App. 400; *Czaja v. Sallack*, 13 Conn. App. 411; *Siefert v. Barrett*, 13 Conn. App. 410. The plaintiff did not discuss the equal protection claim in his memorandum of law date stamped December 2, 1987 and hence the court is disinclined to consider same except to note that where the classifications such as those referred to herein do not trammel the fundamental rights or interests nor burden an inherently suspect class equal protection analysis requires only that the classification be rationally related to a legitimate state interest. *Giannattasio v. Stamford Youth Hockey Association, Inc.* 621 F. Supp. 825, 829. The gravamen of the plaintiff's claim is that the decedent's constitutional rights under the equal protection

clause of the Federal and State Constitutions have been violated because the state waived sovereign immunity in actions against the Commissioner of Health Services or the Commissioner of Mental Retardation. The burden is on the complaining party to establish that the statutory distinction is without a rational basis. *Miller v. Hefferman*, 173 Conn. 506, 509. The classifications complained of meet the standard noted above.

Motion to Dismiss is granted.

Motion For Stay is denied.

/s/ Flanagan
John C. Flanagan, Judge

Supreme Court, U.S.
FILED
DEC 20 1989
JOSEPH F. SPANIOL, JR.

No. 89-704

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen Krozser,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

OBJECTION TO PETITIONER'S MOTION FOR DEFERRED CONSIDERATION

CLARINE NARDI RIDDLE
ATTORNEY GENERAL
RICHARD T. COUTURE
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Telephone: (203) 566-7570
Counsel of Record
for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OBJECTION TO PETITIONER'S MOTION FOR DEFERRED CONSIDERATION 1

CONCLUSION 4

TABLE OF AUTHORITIES

Cases: **Page(s)**

Felder v. Casey, ___ U.S. ___, 108 S.Ct. 2302 (1988) 3

Howlett v. Rose, 537 So.2d 706 (Fla. App. 2 Dist. 1989), *rev. denied*, 545 So.2d 1367 (1989), *cert. granted*, 58 U.S.L.W. 3320 (11/14/89) . . . . . *passim*

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978) 2

Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398 (1980) 2

Will v. Michigan Dept. of State Police, ___ U.S. ___, 109 S.Ct. 2304 (1989) 3

Federal Statutes:

42 U.S.C. § 1983 . . . . . *passim*

No. 89-704

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen Krozser,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

OBJECTION TO PETITIONER'S MOTION FOR DEFERRED CONSIDERATION

Petitioner has requested that this Court defer consideration of his petition until thirty days after the Court renders its decision in *Howlett v. Rose*, No. 89-5383. The petition for certiorari in *Howlett* was granted on November 13, 1989. 58 U.S.L.W. 3320 (11/14/89). In support of his motion, the Petitioner claims that the issues in *Howlett* and in this case are identical. A review of the questions presented in both cases shows clearly, however, that the issues are not similar and that no purpose would be served by deferring consideration of the petition in this case.

In *Howlett v. Rose*, 537 So.2d 706 (Fla. App. 2 Dist. 1989), *rev. denied*, 545 So.2d 1367 (Fla. 1989), an action for injunctive relief and money damages was brought pursuant to 42 U.S.C. § 1983 against a county school board and several of the county's school officials. The District Court of Appeals of Florida for the Second District ruled that the defendants in *Howlett* were immune from Section 1983 actions in Florida's courts in that, under Florida laws, school boards and municipalities are beneficiaries of sovereign immunity. *Id.*, 708. The question presented in *Howlett*, therefore, is whether a Florida school board and its local school officials, by virtue of the sovereign immunity of the state, are immune from suit in actions brought against them in Florida courts pursuant to 42 U.S.C. § 1983. 58 U.S.L.W. 3343 (11/21/89).

The defendant in this case is the State of Connecticut.[1] The only issues in this case are whether the State of Connecticut, by virtue of its sovereign immunity, is immune from suit for money damages brought against it in state court pursuant to 42 U.S.C. § 1983 and/or whether the State of Connecticut is a "person" under § 1983.

It is now established that school boards and local school officials are "persons" who can be sued directly under § 1983 for money damages. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035 (1978). Through its enactment of § 1983, making municipalities amenable to suit, Congress "abolished whatever vestige of the State's sovereign immunity the municipality possessed." *Owen v. City of Independence*, 445 U.S. 622, 647–648, 100 S.Ct. 1398, 1413–1414 (1980). In ruling that a state notice-of-claim statute is preempted pursuant to the Supremacy Clause when a § 1983 action for money damages is brought in a state court against a municipality and municipal police officers, this

---

[1] As acknowledged by the Petitioner at page ii of his Jurisdictional Statement, the action as to Raymond M. Lopes, in his official capacity as Commissioner of Correction of the State of Connecticut, abated upon his departure from office.

Court stated that "[t]he decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the [state's] legislature, made, and it is a decision that the State has no authority to override." *Felder v. Casey*, ____ U.S. ____, 108 S.Ct. 2302, 2309 (1988). There is certainly a question as to whether the decision of the Florida District Court of Appeals in *Howlett* conflicts with the above rulings of this Court concerning the liability of state subdivisions under § 1983 and attempts to bar or condition such suits when filed in state courts.

The questions presented in this case have nothing to do with the liability of municipalities, boards of education or other local government units under § 1983. The defendant in this case is the State of Connecticut. This Court has recently ruled in unambiguous terms that § 1983 was not intended to override the "well-established immunity of a State from being sued without its consent," and that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Michigan Dept. of State Police*, ____ U.S. ____, 109 S.Ct. 2304, 2310, 2312 (1989). No purpose would be served by deferring consideration of the petition in this case pending a decision in *Howlett*.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petitioner's Motion for Deferred Consideration.

Respectfully submitted,

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

RICHARD T. COUTURE
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Telephone: (203) 566-7570

Counsel of Record
for Respondent

December 20, 1989

Supreme Court, U.S.
FILED
JAN 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-704

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen F. Krozser,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITIONER'S REPLY TO RESPONDENT'S OPPOSING BRIEF

LOUIS MARSHALL WINER
2911 Dixwell Avenue
P.O. Box 5619
Hamden, CT 06518
(203) 281-3142

Counsel of Record
for Petitioner

January 2, 1990

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

TABLE OF CONTENTS

Page

PETITIONER'S REPLY TO RESPONDENT'S OPPOSING BRIEF 1

1. Jurisdictional allegations 2

2. *Will v. Michigan Dep't of State Police* and 42 U.S.C. §1988 3

3. Conflicts with other decisions and significance of issue 6

4. Conclusion 7

TABLE OF AUTHORITIES

Cases: **Page(s)**

Brumage v. Woodsmall, 444 N.W.2d 68 (Iowa 1989) 6

Burnett v. Grattan, 468 U.S. 42 (1984) 6

Erwin v. Westfall, 484 U.S. 292 (1988) 4

Felder v. Casey, 487 U.S. ____, 101 L.Ed.2d 123, 108 S.Ct. 2302 (1988) 6

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 6

Howlett v. Rose, 537 So.2d 706, *rev. denied*, 545 So.2d 1367 (Fla. 1989), *cert. granted*, No. 89-5383 (November 13, 1989) 7

Krozser v. New Haven, 215 Conn. 415, 562 A.2d 1080 (1989) 2, 4

Mathews v. Diaz, 426 U.S. 67 (1976) 3

Mitchell v. Forsyth, 472 U.S. 511 (1985) 6

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 6

Robertson v. Wegmann, 436 U.S. 584 (1978) 5

Will v. Michigan Dep't of State Police, 491 U.S. ____, 105 L.Ed.2d 45, 109 S.Ct. 2304 (1989) 2, 5

TABLE OF AUTHORITIES (continued)

United States Statutes: **Page(s)**

28 U.S.C. §1257 ..... 2, 3

28 U.S.C. §1653 3

42 U.S.C. §1983 ..... 2, 3, 4, 5, 6

42 U.S.C. §1988 ..... 2, 4, 5, 6

Connecticut Statutes:

Chapter 53, *Claims against the State* 4, 5

§4-160, Conn. Gen. Stat. 4

§4-165, Conn. Gen. Stat. 4

No. 89-704

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

JACOB J. KROZSER, Administrator of the Estate of Stephen F. Krozser,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITIONER'S REPLY TO RESPONDENT'S OPPOSING BRIEF

Respondent State of Connecticut,[1] in its opposing brief in No. 89-704: (1) questions jurisdiction based on the irregular filing of a "jurisdictional statement" by counsel for Petitioner[2]

[1,2] We refer here to the filings in this case in all instances as if the initial filing had been such a Petition ("Pet.") and not an attempted Jurisdictional Statement. The Clerk's office of this Court advised by letter and instructed Respondent's counsel that the filing was docketed and would be treated

(continued)

instead of a proper Petition for Writ of Certiorari under 28 U.S.C. §1257(a) following the 1988 amendment (Brief in Opposition, p. 1); (2) claims that this Court's decision in *Will v. Michigan Dep't of State Police*, 491 U.S. ____, 105 L.Ed.2d 45, 109 S.Ct. 2304 (1989), renders Petitioner's Question Presented irrelevant (Resp. Br. Opp., p. 8); and (3) claims that Petitioner's challenge to the decision below (as to claims against the State of Connecticut for money damages for civil rights deprivations committed by State officers or employees under Connecticut's legislative framework for *Claims against the State*) neither raises any significant issue of federal law nor shows a conflict with a pertinent state or federal decision (Resp. Br. Opp., pp. 4–7).

The texts of 42 U.S.C. §§1983 and 1988 are set forth in footnotes 2 and 4 in the opinion of the Connecticut Supreme Court below, *Krozser v. New Haven*, 215 Conn. 415, 416–417, 562 A.2d 1080 (1989), printed at pages 2A and 3A of the Appendix to the Petition.

1. **Jurisdictional allegations.** Petitioner's counsel plainly but mistakenly sought review in this Court by appeal, alleging the pre-amendment provisions of 28 U.S.C. §1257(2) as the jurisdictional basis (Pet., p. 2), instead of by petition for writ of certiorari as proper under 28 U.S.C. §1257(a) following its amendment in 1988. Respondent acknowledges that it "has been instructed by the Clerk's office that the Jurisdictional

---

[1,2] *(continued)*
as a Petition for Writ of Certiorari. The Appendix to the initial filing is referred to as the Appendix to the Petition ("Pet. App."), the opposing brief as Respondent's Brief in Opposition ("Resp. Br. Opp."), and the parties as Petitioner and Respondent. Notice that this case proceeds as a Petition for Writ of Certiorari rather than an Appeal has been provided to the Connecticut Supreme Court and to its Clerk's Office by filing with that Court a copy of the letter from the Clerk of this Court advising of the docketing of the "jurisdictional statement" as a Petition for Writ of Certiorari, a copy of this Reply, and a letter to the Connecticut Supreme Court Clerk advising of these particulars.

Statement filed in this case will be treated as though it were a Petition for Writ of Certiorari." (Resp. Br. Opp., p. 1).

Under 28 U.S.C. §1653:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Where, as here, such mistaken allegation is plain and causes no prejudice, the Petition's allegation of jurisdiction should be deemed to have been amended so that the last two sentences on page 2 of the Petition state:

> This petition for writ of certiorari is being docketed within 90 days from the entry of such judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

and, similarly, the conclusion or prayer at the close of the Petition (Pet., p. 16) should be deemed to have been amended to state:

> For these reasons, this Court should grant certiorari.

in order to achieve the "statutory purpose of avoiding needless sacrifice to defective pleading . . . ." *Mathews v. Diaz*, 426 U.S. 67, 75 n.9 (1976).

Alternatively, Petitioner so amends his Petition under 28 U.S.C. §1653 upon such terms as this Court provides.

2. ***Will v. Michigan Dep't of State Police*** **and 42 U.S.C. §1988.** This Court's decision June 15, 1989, while this case was *sub judice* before the Connecticut Supreme Court, in *Will v. Michigan Dep't of State Police*, 491 U.S. ____, 105 L.Ed.2d 45, 109 S.Ct. 2304 (1989), that a State is not a "person" within the 1871-defined ambit of 42 U.S.C. §1983, is not pertinent here.

The opinion below, of which review is sought, refers to that issue in footnote 5 and cites the *Will* result (Pet. App., pp. 3A–4A), but explicitly states there, ". . . [W]e did not address that issue." 212 Conn., at 417–418 n.5. The decision below rests squarely on the Connecticut Supreme Court's determination that, where sovereign immunity is relaxed by the State's constitution and statutes, the State may nevertheless condition access to the State's courts for a claim for money damages for a federal civil rights deprivation under §1983 upon successful completion of a prior administrative proceeding. This portion of the Connecticut Supreme Court's opinion is quoted in the paragraph beginning at the foot of page 8 of the Petition, and the validity of such condition is the only issue of which review is sought by the Question Presented (Pet., p. i).

Where, as here, there is a summary dismissal upon a threshold issue, related issues not actually in question but appropriate for subsequent development in any further proceedings may be drawn upon by Respondent to cloud the foreground as well as the horizon. See, for example, *Erwin v. Westfall*, 484 U.S. 292, 299–300 (1988). For clarity, we address two of these briefly here to show in advance that their proper subsequent consideration will also support the grant of certiorari by enhancing rather than diminishing the significance of the issue directly involved as well as the significance of the case upon full development.

Petitioner contends that the State of Connecticut is the proper defendant in a civil rights action for money damages in a Connecticut state court *not* by operation of 42 U.S.C. §1983 but rather by the joint operation of 42 U.S.C. §1988 and the provisions of chapter 53 of the Connecticut General Statutes (§§4-160, 4-165, Conn. Gen. Stat., quoted at Pet., p. 4) which empower the Connecticut Claims Commissioner to authorize suit against the State when the Commissioner "deems it just and equitable . . . on any claim which, in his opinion, presents an issue of law or fact under which the state, were it a private person, could be liable[;]" which immunize state officers and employees from personal liability ". . . for damage or injury,

not wanton, reckless or malicious, caused in the discharge of his duties or within the scope of his employment[;]" and which require that, "Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter."

Under *Robertson v. Wegmann*, 436 U.S. 584, 588 (1978), the "ultimate rule adopted under §1988 ' "is a federal rule responsive to the need whenever a federal right is impaired." ' " (Citations omitted.) There, a Louisiana survivorship statute which allowed only a spouse, child, parent, or sibling, 436 U.S., at 591, to serve as a substituted plaintiff to permit the survival of a civil rights action upon the death of the "person" who actually suffered the rights deprivation, was upheld because, although somewhat limited in its provision for survivorship, it was evenhanded as between federal civil rights claims and other claims. Implicitly, and in the practice in this field since 1978, that decision upheld the principle that State supplementary remedies not within the 1871-defined ambit of 42 U.S.C. §1983 as to survivorship could be "adopted" or imported into the §1983 practice if not "inconsistent with the Constitution and laws of the United States." 436 U.S., at 590. Thus, designated survivors as substituted party plaintiffs not recognized in 1871, and the survival of claims which would have abated on death of the claimant in 1871, both established by state statute after 1871, are adopted into the §1983 practice by operation of the provisions of §1988 for expansion of remedies in accordance with local law. Analogously, in Connecticut, although the State was not a §1983 "party" under *Will* as of 1871, and was not subject to any §1983 claim as of 1871 by virtue of sovereign immunity, the enactment of chapter 53 of its statutes, "*Claims against the State*," under the provisions of §1988 for expansion of remedies, makes the State the proper defendant and establishes the cognizability of the §1983 claim against the State which did not exist as of 1871.

Whatever the actual and practical content of the test for the authorization of suit against the state as provided by

statute to be applied by Connecticut's Claims Commissioner, and it might be "consistent with the Constitution and laws of the United States" to examine questions of absolute or qualified immunity under cases such as *Mitchell v. Forsyth*, 472 U.S. 511 (1985), *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), it is clearly inconsistent with and "directly contrary to the several principles enunciated in *Felder v. Casey*, 487 U.S. ____, 101 L.Ed.2d 123, 144, 108 S.Ct. 2302, 2312 (1988), reiterating the statements in *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984)," (Pet., p. 13), to require that test to be applied first in an administrative proceeding before access to a state court *may* be achieved for a §1983 claim for money damages in Connecticut.

The validity of such a precondition is the subject of this Petition. That the State is a proper defendant by operation of §1988 together with the state remedial statutes, and that there can be no additional limits on waiver of immunity that a Connecticut Claims Commissioner can apply beyond what can be applied in a court proceeding (because such would be "inconsistent with the Constitution and laws of the United States"), are issues for further proceedings in Connecticut courts should this case be remanded.

3. Conflicts with other decisions and significance of issue. Respondent incorrectly states that the Petition shows no conflict between the decision below and the decisions of this Court. See, Petition, at pages 13 to 14, a portion of which is quoted on this page above. As to the decisions of state courts of last resort, *Brumage v. Woodsmall*, 444 N.W.2d 68 (Iowa 1989), indicates a proper application of the principles of *Felder* and that the Iowa Supreme Court would likely have reached the opposite result had the precise circumstances of this case been before it, but a precise conflict would require the extremely unlikely circumstance of a precise parallel between the Connecticut statute and that of the other state.

The significance of the federal issue here is indicated by this Court's grant of certiorari in No. 89-5383, *Howlett v. Rose*, which also involves the issue of limitations upon access to state courts for federal civil rights claims where the state has statutorily relaxed the strictures of sovereign immunity. Certiorari was granted in *Howlett* November 13, 1989, after the filing of the instant petition, and Petitioner has filed a separate motion to defer consideration of this petition until a time after the decision in *Howlett* as that decision will likely permit a summary disposition of this case.

4. Conclusion. For the foregoing reasons, if this Court does not grant the motion in the instant case for deferred consideration, it should grant certiorari.

Respectfully submitted,

LOUIS MARSHALL WINER
2911 Dixwell Avenue
P.O. Box 5619
Hamden, CT 06518
(203) 281-3142

January 2, 1990